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In the Supreme Court of the United States

CITY OF SACRAMENTO AND MIKE KASHIWAGI, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF SACRAMENTO, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

JOAN BARDEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

SAMUEL L. JACKSON
City Attorney
GERALD C. HICKS
Deputy City Attorney
Sacramento City Attorney's Office
980 Ninth Street, 10th Floor
Sacramento, CA 95814
(916) 264-5346

ROY T. ENGLERT, JR.*
ALAN E. UNTEREINER
LAWRENCE S. ROBBINS
KATHRYN S. ZECCA
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

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SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

It should surprise no one that the Department of Justice – having filed an amicus brief in the Ninth Circuit supporting respondents – now urges denial of review in this Court. What *is* surprising, however, is that the Solicitor General has chosen to address an issue that is materially *different* from the question decided by the Ninth Circuit and raised in our petition:

> Whether a city's ***provision, construction, and maintenance*** of a ***system*** of public sidewalks for its residents is a "program or activity" subject to * * * Section 504 of the Rehabilitation Act * * * or a "service[]," "program[]," or "activit[y]" subject to * * * Title II of the [ADA] * * *.

U.S. Br. I (emphasis added); compare Pet. i. But the Ninth Circuit held that the *sidewalks* – not the overall *system* of sidewalks – are a service, program, or activity. See Pet. App. 2a ("We must decide whether public sidewalks in the City of Sacramento are a service, program, or activity of the City * * *. We hold that they are * * *.").[1]

Equally perplexing, the Ninth Circuit did not pass on (and our petition therefore does not raise) the question whether Sacramento's combined "provision, construction, and maintenance" of sidewalks qualifies as a public program. The court of appeals did not decide whether "construction" is a program or activity because petitioners admitted that it was – and agreed, as part of the City's construction program and activities, to install curb ramps at intersections when resurfacing or altering city streets

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[1] See also Pet. App. 3a (describing issue debated by the parties, and holding of district court, as involving "whether sidewalks are a service, program, or activity within the meaning of the ADA"); *id.* at 3a n.2 (noting that respondents "represented to the district court that a holding that *sidewalks* are not a service or program negated their theory of the case ") (emphasis added); *id.* at 5a, 8a.

and when building new roads and sidewalks. Nor did the Ninth Circuit decide whether "maintenance" is a program or activity (again, petitioners agreed that it is, and acknowledged that the City could not, for example, discriminate against mobility-impaired residents in its maintenance program or activities by categorically refusing to repair dangerous conditions that arise on the City's curb ramps).[2] The only issue actually decided by the Ninth Circuit is whether the mere ownership – or, in the Solicitor General's carefully chosen terminology, "provision" – of sidewalks is an activity, program, or service.

The distinction is important. Major consequences flow from the difference between treating a *system* of sidewalks as a service, program, or activity and treating the sidewalks *themselves* as a service, program, or activity. As the Solicitor General notes, if the relevant service, program, or activity is the overall *system* of sidewalks, then only that system need be "*generally* accessible to and usable by individuals with disabilities" when "viewed 'in its entirety.'" U.S. Br. 16 (emphasis added) (quoting 28 C.F.R. § 35.150(a)(1)).[3] Under the Ninth Circuit's

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[2] The Ninth Circuit did mention maintenance. In a leap of logic that the Solicitor General makes no effort to defend, the Ninth Circuit reasoned that, because Sacramento "maintain[s]" its sidewalks (by complying with the limited duty under state law to remediate dangerous conditions), the City is under a federal duty to "*maintain[] their accessibility*" to all members of the respondent class. Pet. App. 6a (emphasis added). That conclusion, however, necessarily reflects the Ninth Circuit's holding that the *sidewalks themselves* are a program, service, or activity subject to the "program accessibility" requirements. See 28 C.F.R. § 35.150(a) (requiring "*each* service, program or activity" to be "operate[d]" so that it is "readily accessible and usable" to people with disabilities) (emphasis added). Under the Ninth Circuit's pretzel logic, *any* type of existing facility could be converted into a program, service or activity, so long as the facility is – like most public facilities – "maintained."

[3] Even then, major problems would remain. The Access Board has set no accessibility standards – other than those pertaining to curb cuts – for existing sidewalks or systems of sidewalks, leaving municipalities and courts completely at sea as to how far a city must go in making its

holding that the *sidewalks themselves* are services, programs, or activities, by contrast, it would appear that the accessibility of each and every sidewalk is a fair subject for litigation, mitigated only by the "undue burden" defense.

There is a reason for the Solicitor General's effort to change the terms of debate. By combining items that qualify as programs or activities (construction or maintenance) with those that do not (ownership of sidewalks or other forms of infrastructure), he seeks to deflect the Court's attention from the basic incompatibility of the Ninth Circuit's holding with the statutory text. And by addressing only a milder (though still incorrect) version of the Ninth Circuit's actual holding, the Solicitor General is able to make the decision below seem less radical than it really is, and to offer the Court soothing reassurances that the decision below "is not nearly as startling as petitioners and their amici suggest." U.S. Br. 8. Whether the decision is just a little startling (as the Solicitor General suggests), or startling in the extreme (as organizations representing thousands of cities, counties, and other local governments have told this Court in three important amicus briefs), it is wrong, it is overbroad – as the Solicitor General seems to concede in passing, U.S. Br. 14 – and it threatens ruination of this Nation's cities in the absence of immediate review.

"system" of sidewalks "generally" accessible. Cf. ACCESS BOARD, ACCESSIBLE RIGHTS-OF-WAY: A DESIGN GUIDE Chapter 3.2 (1999) (22 pages of design specifications for *new* sidewalks). The facts of this case starkly illustrate the problem – petitioner believes that the settlement already entered into ensures that Sacramento's *system* of sidewalks will be generally accessible, but respondents have continued to litigate their theories that the City must do more. The courts below would have nothing to look to in deciding whether Sacramento's "system" must be modified, even if they follow the Solicitor General's suggestion that only the "system" must be made accessible and not the Ninth Circuit's holding that each sidewalk is itself a service, program, or activity governed by Title II. These imponderable issues are better addressed by adhering to the heretofore-settled distinction between facilities and programs. See Nat'l League of Cities Br. 4-5, 12-14; Nat'l Ass'n of Counties Br. 2-3, 7-13.

At the end of the day, it is far from clear that the Solicitor General really believes that only the overall "system" of sidewalks must be made accessible under the ADA and Rehabilitation Act. He states that the ADA is violated "[w]hen an individual with a disability is denied the use of the sidewalk system * * * because sidewalks are inaccessible." U.S. Br. 8. That statement suggests that, in the more typical case (such as *Krumel*, see U.S. Br. 14-15) brought by an individual plaintiff who is complaining about particular obstructions on specific sidewalks near his home, it would be no defense for the municipal government to say that the overall "system" is accessible even if these particular sidewalks are not.

On the merits, the Solicitor General has no convincing answer to the major points made in the petition and the amicus briefs, and the few new arguments he adds are wrong. Most disturbing is the his cavalier treatment of prior Department of Justice guidance, on which cities have relied in making budgetary decisions of great consequence, that existing sidewalks are covered by Title II of the ADA *only* "if such sidewalks are necessary to ensure accessibility to the entity's programs, services, or activities." Pet. App. 33a; see also Pet. App. 34a-35a; California Cities Br. 12 n.7. Those publicly available guidance letters – which indisputably presuppose that the sidewalks are not *themselves* programs, services, or activities – were signed by the *head of the Civil Rights Division*. Yet the Solicitor General dismisses them in a footnote as mere "informal letters" and cites letters from *subordinate* officials in supposed contradiction of the letters on which we rely. U.S. Br. 12 n.6.[4] This is not good government. Whatever the state of the law on deference to

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[4] The letters from subordinates do not, in any event, support the Ninth Circuit's holding. The 1996 letter from "J. Wodatch" that the Solicitor General cites refers only to *newly constructed* sidewalks, whereas the issue in this case concerns *existing* sidewalks. The 1994 letter from "S. Oneglia" that the Solicitor General cites says only that sidewalks "when viewed in their entirety" must be made accessible, whereas the Ninth Circuit put no such qualification on its holding.

government pronouncements (see Pet. 26-30), it borders on the unconscionable for the federal government to "discover" more than a decade after the ADA was passed that Title II applies to all sidewalks (or at least all systems of sidewalks), visit the huge fiscal consequences of that discovery on the Nation's cities, and dismiss prior, inconsistent guidance from the highest levels of the Justice Department as merely "informal."

No less stunning is the Solicitor General's willingness to join the Ninth Circuit in relying on regulations pertaining to *curb cuts* as support for imposing on cities obligations that go *far beyond curb cuts*. As we explained in the petition, the parties have reached a settlement with regard to the City's obligation to install curb cuts. What remains in litigation is respondents' insistence (see Pet. 19) that the City alter, reconfigure, or even rebuild its *existing* sidewalks to widen surfaces; move benches, fire hydrants, utility poles, traffic signal poles, telephone poles, trees, newspaper racks, guide wires, mailboxes, and other package service receptacles; eliminate roots and other protruding objects that might present an obstacle to individuals in wheelchairs or with vision impairments; and eliminate all abrupt changes in level of more than ¼ inch (or ½ inch if the change in level is beveled), including flares and cross slopes where private driveways cross sidewalks.[5] The relevant regulations, 28 C.F.R. §§ 35.150-35.151, "address [only] curb ramps," as the Ninth Circuit acknowledged. Pet. App. 8a. And, as we have explained (Pet. 26-27), those regulations as relevant to existing facilities require only "transition plans." The Ninth

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[5] The Solicitor General misleadingly suggests that most of what this litigation is about is relatively easy-to-remove obstacles such as benches, signs, protruding wires, and plant growth. U.S. Br. 4, 17-18. Yet, in respondents' own words (Resp. C.A. Br. 9), "Other barriers require greater effort to remedy, such as utility poles that narrow the sidewalk and thus block access. One of the most common barriers involves excessive slope or cross slope conditions, often created by driveways, along the length of the sidewalk * * *." Changing the level of a sidewalk is an expensive proposition, which in some cases will require tearing out and replacing an entire existing stretch of sidewalk.

Circuit's notion that transition plans for curb ramps "would be meaningless if the sidewalks between the curb ramps were inaccessible" (Pet. App. 7a) runs roughshod over the pragmatic compromises that lie at the heart of Title II of the ADA as applied to existing facilities. See Nat'l League of Cities Br. 9-10. The Solicitor General does not expressly repeat the Ninth Circuit's error in extending the regulations far beyond their actual coverage, but neither does he acknowledge the extension and provide any – let alone a plausible – defense of it.[6]

The Solicitor General also joins the Ninth Circuit in obliterating the critical distinction between *facilities* and *programs* under the relevant statutes. The Solicitor General admits without hesitation that sidewalks are *facilities*. U.S. Br. 2-3, 11 (citing 28 C.F.R. § 35.104). The concept of "program accessi-

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[6] Disturbingly, however, the Solicitor General twice relies on a notice of proposed rulemaking found at 60 Fed. Reg. 58,462 (1995). U.S. Br. 11, 13 n.6. The cited notice of proposed rulemaking suggested that cities should get *relief* from the excessively onerous deadlines provided by 28 C.F.R. § 35.150 (the regulation cited in the text above) for installing *curb cuts*. Among other things, the Department of Justice noted cities' "strained fiscal resources" (60 Fed. Reg. at 58,463), and "the limitations on available public funds" (*id.* at 58,464). The same notice reiterated that "[p]ublic entities * * * are not necessarily required to make each of their existing facilities accessible." *Id.* at 58,463. Cities reasonably read this notice of proposed rulemaking as a recognition of the *limitations* on their responsibilities, not as the Justice Department's effort to declare that they have – and have always had – extraordinarily broad responsibilities with respect to *existing* facilities of the sort this lawsuit seeks to impose. Furthermore, the only sentence the Solicitor General actually quotes from this notice of proposed rulemaking (U.S. Br. 11) says that "*maintenance* of pedestrian walkways by public entities is a covered program that is required to be made accessible by the installation of curb ramps." 60 Fed. Reg. at 58,462 (emphasis added). (The Solicitor General both truncates the sentence to make it appear to apply to more than curb ramps, and cites it to the wrong page.) Of course, we have conceded that *maintenance* of public sidewalks is covered by Title II of the ADA, see Pet. 6, 25-26, so the sentence the Solicitor General quotes is not at all inconsistent with our position.

bility" (see generally Nat'l Ass'n of Counties Br. 7-9) is a government construct designed precisely to ensure that covered entities make *programs* accessible, not every existing *facility*. See 28 C.F.R. Part 35, App. A, at 534 ("Program accessibility has proven to be a useful approach * * * [and] will continue to apply with respect to facilities now in existence, because the cost of retrofitting existing facilities is often prohibitive.").[7] If an existing *facility* can also be deemed a *program*, however, then the facility must be modified to provide access to the "program" consisting of itself, and the key concept of program accessibility has been rendered nonsensical.

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[7] See also ACCESS BOARD, ACCESSIBLE RIGHTS-OF-WAY: A DESIGN GUIDE 20-21 (1999):

> The concept of program accessibility has been widely misunderstood. Derived from regulations implementing the Rehabilitation Act of 1973, the idea of providing access to programs – not just to facilities – permits a broader and more flexible range of solutions to existing access problems. * * * [E]xisting facilities do not have to be made accessible if other means of providing access are effective. Except for the installation of curb ramps – which are specifically required for program access – structural changes are an option of last resort.

At the end of a long footnote, the Solicitor General cites page 18 of this same DESIGN GUIDE as supposed support for his position. U.S. Br. 13 n.6. Page 18, however, says, "certain **existing** pedestrian routes must be retrofitted with curb ramps," and "[i]t is a measure of their importance to accessible pedestrian circulation that curb ramps are the only construction item expressly required in the title II regulation" (emphasis in original). Those statements are far more consistent with petitioners' position than with the Solicitor General's. Notably, respondents have not relied on this publication – the federal government's most comprehensive pronouncement about cities' obligations with respect to sidewalks – at all. The Court may fairly infer that the DESIGN GUIDE supports petitioners' position more than respondents' – and indeed it does. *E.g.*, DESIGN GUIDE 15 ("The *construction, alteration, or maintenance* of the public rights-of-way" – all of which we concede are covered, but not the mere *provision* of existing sidewalks – "is an activity of a public entity and is therefore subject to the nondiscrimination requirements.").

The Solicitor General adds a new wrinkle by suggesting that 23 U.S.C. § 133 – Section 1108 of the Transportation Equity Act for the 21st Century, known as "TEA-21" – constitutes Congress's "explicit[] recogni[tion] that 'public sidewalks' are covered by Title II." U.S. Br. 10. But we acknowledge that public sidewalks are *sometimes* subject to requirements under Title II – the settlement already reached between the parties, indeed, requires the City of Sacramento to undertake extensive efforts with regard to sidewalks in the name of compliance with Title II. Our position is that sidewalks are covered as "facilities" and are subject to requirements *only* when they are newly constructed, altered, or maintained or are in need of modification (generally curb cuts) to provide access to some public program, service, or activity as required by 28 C.F.R. § 35.150. TEA-21 provides funding to offset some of the cost of compliance with the obligations that *are* imposed by the ADA with respect to sidewalks, but is no justification for expanding cities' sidewalk obligations beyond the ADA's terms.

The real significance of TEA-21 lies in its confirmation of our predictions about the enormity of the fiscal burden sidewalk modification places on cities. "TEA-21 clarified that accessibility improvements to pedestrian facilities are eligible for funding under the Surface Transportation Program. Approximately *$33 billion* is authorized over the six years of the program (1998-2003) for sidewalk improvements to comply with the Americans with Disabilities Act." DESIGN GUIDE 16 (emphasis added). That amount of money is necessary just to subsidize compliance with the sidewalk obligations that the ADA really does impose and the Access Board spells out in the DESIGN GUIDE; the *additional* cost of complying with the sidewalk obligations that the Ninth Circuit has read into the ADA is staggering. Such obligations should not be foisted on the Nation's cities without review by this Court.

The Solicitor General also contends that sidewalks *must* qualify as a program, service, or activity because otherwise "there would be no basis (in the ADA) for imposing any

program accessibility requirements with respect to a city's public sidewalk network, including curb ramps." U.S. Br. 11. That is simply untrue. The ADA would still impose obligations on cities to take steps to make their sidewalks accessible where necessary to ensure access to public programs or services offered in adjacent buildings. And the ADA would still impose a duty on public entities not to "den[y] the benefits of" their construction activities or programs to persons with disabilities by failing to incorporate curb ramps or curb cuts in newly constructed sidewalks. See 42 U.S.C. §§ 12132, 12146.

Finally, the Solicitor General urges the absence of a square conflict on the circuits *with respect to sidewalks* and the interlocutory posture of the case as reasons to deny review. U.S. Br. 13-18. (The Solicitor General does not deny that the circuits are in conflict with regard to the correct analytic approach to identifying covered programs, services, or activities, see Pet. 13-16, but he insists that only a decision with respect to sidewalks would create a "genuine circuit split," U.S. Br. 15.) In this respect, he merely makes the same arguments respondents made in their brief in opposition, and we adequately answered those arguments in our reply brief (at 3-6, 10).

* * * * *

This case involves *existing* sidewalks, which under the statutory and regulatory framework are to be treated very differently from new construction and alteration. See Nat'l Ass'n of Counties Br. 11-13; DESIGN GUIDE 18, 20-23. The Solicitor General pays inadequate heed to that distinction. Even worse, the Ninth Circuit – whose decision, not the Solicitor General's brief, is before this Court for review – belittled all distinctions necessary to define "services, programs, or activities" (42 U.S.C. § 12132) as "needless 'hair-splitting'" (Pet. App. 6a) and held that Title II applies to "anything a public entity does" (Pet. App. 5a). It is no wonder that the Nation's municipalities have poured out in amicus briefs urging this Court to grant review. It is a shame, but not a surprise in light of the position taken below, that the Solicitor General has chosen to leave the munici-

palities in the lurch and defend the decision below. The Solicitor General can do so, however, only by rewriting the question presented, belittling prior solemn announcements by high officials of the Department of Justice, obscuring key distinctions, and relying on makeweight arguments such as his invocation of 23 U.S.C. § 133.

The responsibility falls to this Court to recognize the errors that the Solicitor General will not acknowledge, and to save the cities from the enormous fiscal burdens that will follow if the Ninth Circuit's erroneous decision stands undisturbed. A call for the views of the Solicitor General yields important input for this Court, but not dispositive guidance. See *Hillside Dairy Inc.* v. *Lyons*, 123 S. Ct. 818 (2003) (granting certiorari in case in which SG had recommended denial); *Pharmaceutical Research & Mfrs. of America* v. *Walsh*, 123 S. Ct. 1855 (2003) (merits decision after grant after SG had recommended denial); *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355 (2002) (same); *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002) (same); *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473 (2002) (same); *Owasso Indep. Sch. Dist.* v. *Falvo*, 534 U.S. 426 (2002) (same); *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001) (same). The Solicitor General's recommendation of denial here should be viewed especially skeptically, in light of the fact that the Department of Justice had already committed to a position below, and in light of the errors in the Solicitor General's analysis and the inconsistency of his position with earlier pronouncements of the federal government.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, amicus briefs, and reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL L. JACKSON
City Attorney
GERALD C. HICKS
Deputy City Attorney
Sacramento City
Attorney's Office
980 Ninth Street, 10th Floor
Sacramento, CA 95814
(916) 264-5346

ROY T. ENGLERT, JR.*
ALAN E. UNTEREINER
LAWRENCE S. ROBBINS
KATHRYN S. ZECCA
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

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